FILED

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No. _____

In The

Supreme Court of the United States

October Term, 1998

WALTER YOUNAS STEWART,

Petitioner,

v.

DENNIS JOSLIN, Certified Public Accountant,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION FOR REVIEW

1. Whether the provisions of 11 U.S.C. § 1225(a)(5)(B)(ii) allowing secured creditors to retain their liens supersedes specific Chapter 12 plan provisions which invalidate cross-collateral clauses in separate mortgages to the same creditor where the plan allows the debtor to pay the balance of the allowed secured claim amount and obtain a release of lien.

PARTIES

Walter Younas Stewart
Defendant/Petitioner

Kim Stewart
Defendant in District Court case only

Dennis Joslin, Certified Public Accountant
Plaintiff/Respondent

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CITATION OF REPORTS OF THE OPINIONS OF COURTS

Civil Action 9-96 CV 169, *Dennis Joslin, Certified Public Accountant v. Walter Younas Stewart and Kim Stewart,* in the United States District Court for the Eastern District of Texas, Lufkin Division. Final Judgment entered September 24, 1997. No reported opinion.

Case Number 97-41338, Summary Calendar, *Dennis Joslin, Certified Public Accountant v. Walter Younas Stewart,* United States Court of Appeals for the Fifth Circuit. Judgment filed September 8, 1998. Motion for rehearing denied October 26, 1998. No reported opinion.

STATEMENT OF JURISDICTION

Walter Stewart ("Stewart") files his Petition for Writ of Certiorari requesting the Supreme Court to review that Judgment dated September 8, 1998 from the United States Court of Appeals for the Fifth Circuit in Cause No. 97-41338. Upon Stewart's Motion for Rehearing, denied on October 26, 1998, Stewart files this Petition for Writ of Certiorari.

The Supreme Court has jurisdiction to review on a writ of certiorari under 28 U.S.C. § 1254 and Rule 10, Supreme Court Rules.

STATUTE INVOLVED IN THE CASE

11 U.S.C. § 1225(a)(5)

(a) Except as provided in subsection (b), the court shall confirm a plan if –

(5) with respect to each allowed secured claim provided for by the plan –

(A) the holder of such claim has accepted the plan;

(B)(i) the plan provides that the holder of such claim retain the lien securing such claim; and

(ii) the value, as of the effective date of the plan, of property to be distributed by the trustee or the debtor under the plan on account of such claim is not less than the allowed amount of such claim; or

(C) the debtor surrenders the property securing such claim to such holder.

STATEMENT OF THE CASE

Dennis Joslin ("Joslin") filed his Original Complaint seeking foreclosure of deed of trust liens covering four separate, but contiguous tracts of land owned by Walter Stewart ("Stewart"). Jurisdiction in the United States District Court was based on 12 U.S.C. § 1823, involving a question of federal law. Stewart contested Joslin's right to foreclose all tracts by seeking to pay the unpaid balance of the allowed secured claim amount due on one tract and obtain a release of lien thereon. Joslin refused to

release the lien on the tract, claiming the cross-collateralization clause in the deed of trust as his justification. Stewart, having previously completed his Chapter 12 bankruptcy argued that the Chapter 12 plan and order modifying the plan invalidated the cross-collateralization clause and specifically allowed him to obtain a release of lien upon payment of the unpaid balance of the allowed secured claim. After both parties filed motions for summary judgment, the District Court held that the cross-collateralization clause was valid under 11 U.S.C. § 1225, despite the plan provisions allowing Stewart to obtain a release of lien upon payment of the unpaid amount of the secured claim.

The District Court and Court of Appeals punished Stewart for not specifically providing in his plan that the "cross-collateralization clauses are invalidated." These Courts have failed to recognize the clear meaning of the language used:

> [I]f at any time prior to, or upon, completion of this Plan as outlined herein, Debtor proposes to pay, and does pay, a Secured Creditor the balance of the Secured Value Plan payment, . . . each respective creditor shall issue an appropriate release of its security interest lien. . . .

This language is the basis for Stewart's insistence that Joslin release his lien on one of the tracts. This language can have no meaning but that cross-collateralization clauses be invalidated. Despite this, the District Court and Court of Appeals held that language in the confirmation order reciting the requirements of Bankruptcy Code Section 1225(a)(5)(B) that

> [A]ll Deed of Trust lienholders will be allowed to maintain their respective liens on the property described on the Schedules in the Chapter 12 Plan, to the full extent of the Plan Secured Values,

clearly required the validation of the cross-collateralization clause. The Fifth Circuit cited the same language to validate Joslin's cross-collateralization clause.

REASONS FOR GRANTING THE WRIT

The Fifth Circuit opinion is in direct conflict with the language of Bankruptcy Code Section 1225(a)(5), the Eighth Circuit opinion in *Harmon v. U.S. through Farmer's Home Administration,* 101 F.3d 574 (8th Cir. 1996) and the Second Circuit opinion in *In re Kerwin,* 996 F.2d 552 (2nd Cir. 1993). The extent of lien rights retained by the secured creditor in Chapter 12 plans provides an important issue of federal law which supports the granting of Stewart's Petition for Writ of Certiorari.

1. The Decision Below Enforced a Cross-Collateralization Clause Which was Directly Contrary to the Debtor's Right to Pay Off a Real Estate Loan and Obtain a Release of Lien.

A cross-collateralization clause is included in a Deed of Trust to allow the secured creditor to refuse to release a lien or security interest when the primary obligation secured by the lien or security interest is paid. Instead, the secured creditor may require the payment of all secondary or other obligations prior to releasing the lien. In

allowing secured creditors to retain their liens, Stewart's plan did not fail to modify those liens as allowed under 11 U.S.C. § 1222(b). Stewart's plan stripped the liens into secured and unsecured parts as allowed under Chapter 12. Stewart's plan determined the "Secured Value" of each claim and provided for the payment of that amount over the life of the plan. The Chapter 12 Plan further provided the following:

> All Deed of Trust leinholders [sic] will be allowed to maintain their respective leins [sic] on the property described on the Schedules in the Chapter 12 Plan, to the full extent of the Plan Secured Values.

The Chapter 12 Plan was modified to extend the term of payment beyond the term of the plan as allowed under 11 U.S.C. § 1222(b)(9). The Order modifying the plan included the language which allowed Stewart to pay a secured creditor the balance of the allowed secured claim and obtain a release of the security interest or lien.

Section 1225(a)(5) contains three options regarding treatment of secured claims. Section 1225(a)(5)(B) is the operative option in Stewart's Chapter 12 bankruptcy. Included in Stewart's plan and modification order were provisions that the holder of an allowed secured claim must retain the lien securing such claim and the present value of the property distributed to the creditor on account of such claim would not be less than the allowed amount of the secured claim. Stewart's allowed secured claims were established in his Chapter 12 Plan. The modification order further recited the unpaid balance of each claim and provided a method for the payment of each claim.

2. The Decisions Below are in Direct Conflict with the Decisions of the Second and Eighth Circuits in the Consideration of the Lien Rights of Secured Creditors Vis-a-Vis the Rights of Debtors under Chapter 12 of the Bankruptcy Code.

In *Harmon v. U.S. through Farmer's Home Administration*, 101 F.3d 574 (8th Cir. 1996), the court considered the requirements of 11 U.S.C. § 1225(a)(5)(B), and noted that the lien retained by the secured creditor cannot invariably mean the exact lien on the exact collateral as it existed before bankruptcy. The purpose of the lien-retention requirement is to adequately protect the creditor's secured claim over the course of the plan repayment period. Section 1225(a)(5)(B) requires only that the creditor retain security for the repayment of its secured claim. *Harmon*, at 583.

In the Second Circuit, the leading case is *In re Kerwin*, 996 F.2d 552 (2nd Cir. 1993). In *Kerwin*, a § 1225(a)(5)(B) lien equates to money equal to the amount of the allowed secured claim or the property itself. Section 1225(a)(5)(B)'s lien requirement protects the lender only to the extent that it ensures that the debtor completes the plan. The plan is confirmable if the plan provides that the holder of a secured claim retain the lien securing the claim. The lien is satisfied when the property to be distributed under the plan actually is distributed and the secured claim amount is paid. Where there are periodic monetary payments to be made under a plan, for example, the lien does not exist beyond the payment period because the claim will have been fully satisfied by payment as provided in the plan. Once the lien is satisfied by either distribution of property

or payment of the allowed secured claim amount, the creditor must release the lien. *Kerwin* at page 559.

The Fifth Circuit held that Joslin's retention of his lien to the full extent of the allowed secured claim amount necessarily entitled Joslin to retain the cross-collateralization clause. The result is clearly contrary to the Second and Eighth Circuits, where under analogous facts, the secured creditor's lien was satisfied upon return of money and/or property equal to the allowed secured claim amount. By allowing Joslin to retain his lien, even in the event of full payment, the Fifth Circuit allowed Joslin to retain more rights than necessary to secure the repayment of the secured claim. By allowing Joslin to retain cross-collateralization rights, the Fifth Circuit allowed him to obtain full payment of the creditor's lien and retain a lien on other property of the debtor in direct conflict with *Kerwin* and *Harmon*.

CONCLUSION

The Fifth Circuit's Judgment in Stewart's appeal is clearly wrong and contrary to established law in the Second and Eighth Circuits. The question presented deals with an important question of federal bankruptcy law upon which there is a dearth of reported cases. This Honorable Court should grant Stewart's writ of certiorari and end the conflict among the Courts of Appeals.

PRAYER

WHEREFORE, PREMISES CONSIDERED, Stewart prays that this Court grant his Petition for Writ of Certiorari, request briefs from all parties, reverse the decisions of the District Court and Court of Appeals for the Fifth Circuit and remand this case to the District Court for trial consistent with this Court's decision.

Respectfully submitted,

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